

No. 1-10-3304

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 91 CR 0193
)	
ALONZO BRYANT,)	Honorable
)	Thomas M. Tucker,
Defendant-Appellant.)	Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Justices Harris and Cunningham concurred in the judgment.

ORDER

¶ 1 *Held:* Where the trial court did not clearly admonish defendant pursuant to *Shellstrom*, the cause was remanded for proper admonishments.

¶ 2 This appeal comes to us after this court twice remanded to the trial court to admonish *pro se* defendant Alonzo Bryant pursuant to *People v. Shellstrom*, 216 Ill. 2d 45 (2005) and *People v. Pearson*, 216 Ill. 2d 58 (2005), after the trial court had recharacterized defendant's section 2-1401 petition (735 ILCS 5/2-1401 (West 2010)) as a postconviction petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)) without notice to defendant. On

appeal, defendant contends that the trial court again failed to comply with our mandate and requests that his cause be remanded for proper admonishments. For the reasons that follow, we find that defendant has not yet received the proper admonishments so that we must vacate and remand for further proceedings.

¶ 3 Following a 1993 jury trial, defendant was found guilty of armed robbery and sentenced as an habitual offender to a term of life imprisonment. On appeal, this court affirmed the conviction and sentence. *People v. Bryant*, 278 Ill. App. 3d 578 (1996).

¶ 4 In July 2001, defendant filed a *pro se* section 2-1401 petition. After stating that it was a "post-conviction remedy before the court," the trial court dismissed the petition. On appeal, this court expressly authenticated defendant's *pro se* petition as a section 2-1401 petition, observing that the trial court's statement was insufficient to infer that the trial court had considered defendant's petition as one under the Act, and affirmed the dismissal. *People v. Bryant*, No. 1-02-0873 (2004) (unpublished order under Supreme Court Rule 23).

¶ 5 In July 2005, defendant filed a second *pro se* section 2-1401 petition (2005 petition), alleging that his sentence was void because "the habitual criminal act was unconstitutionally applied to [him]." The trial court recharacterized the petition as a postconviction petition and summarily dismissed it as frivolous and patently without merit. On appeal, the State confessed error and this court remanded the cause to the trial court for "further proceedings under section 2-1401 and [*Shellstrom*] and [*Pearson*]." *People v. Bryant*, No. 1-05-2541 (2007) (dispositional order).

¶ 6 On remand, defendant did not amend his 2005 petition and the trial court again denied it in October 2007. On appeal, the State conceded that the trial court's admonishments were insufficient pursuant to *Shellstrom* and *Pearson*, and we entered a second remand for compliance with respect to those admonishments. *People v. Bryant*, No. 1-07-3402 (2009)

(unpublished order under Supreme Court Rule 23). The mandate of our decision was issued in December 2009 and the instant appeal concerns the proceedings regarding our decision to remand for a second time.

¶ 7 Six court proceedings from January through October 2010 were held following our second remand. First, on January 15, 2010, the court acknowledged our remand and continued the matter to January 22, 2010.

¶ 8 At the January 22, 2010, proceeding, the court and the State recognized the need to have defendant personally in court for the admonishments:

"MS. ROGALA [Assistant State's Attorney]: It's a remand.

Mr. Bryant had filed a petition, which was recharacterized as a postconviction matter. It was remanded to the Court. You did admonish him, but, again, Mr. Bryant is complaining that he was not sufficiently admonished and never has been remanded again for you to admonish him pursuant to People versus Shellstrom.

THE COURT: So I have to get him.

MS. ROGALA: Yes.

THE COURT: Who writes him in?

MS. ROGALA: Judge, I can writ him in."

The court then set the next date for March 26, 2010.

¶ 9 In a supplement to the record allowed by this court, the State provided the transcript of the March 26 proceeding with both the State and defendant present. The State reminded the court that defendant had filed a section 2-1401 petition (in 2005) which the court recharacterized as a postconviction petition and denied without proper admonishments.

"MS. ROGALA: *** So that's why Mr. Bryant was writ

today, so that you could give him that full admonishment, and allow him to make additions to what he wants to do with the petition.

THE COURT: Sir, you have - - I did accept your petition, but I took it as a post-conviction, and not the 1401.

You have a right, if you want to keep it that way to refile, put in new information, I suppose, for the post-conviction.

But I have ruled on it.

MS. ROGALA: Right. And Judge, there are different pleading requirements. Just for Mr. Bryant's benefit, it's - - I'll write down the statute for him, for the Post-Conviction Hearing Act. He could look at that, and then, if you want to give him time so that he can do his research, and then refile - -

THE COURT: I will. If you want, you can refile it, or you may not refile it. That's up to you.

But I did accept it as a post-conviction. You can take a look and see if that's what you want, and if you want to refile, she'll give you what to look up to refile."

The case was then continued until June 4, 2010.

¶ 10 On June 4 the court confirmed that defendant was last in court on March 26. The following exchange occurred when defendant asked for an attorney:

"THE DEFENDANT: At this time, your honor, I would like to file a motion for appointment of counsel. I will give this to counsel.

THE COURT: Okay.

THE DEFENDANT: Also, if - - without a court order, I can't go to the law library regularly.

And the last time I was here, I didn't get that. So if it please the court, I would like one.

THE COURT: Well, I will - - State, do you have any objection to appointing counsel?

MS. ROGALA: Yes, Judge. This matter was originally filed as a 14-01 Petition under 214-01 which does not provide for appointment of counsel.

You treated it as a post-conviction matter and summarily dismissed it. You have given Mr. Bryant the opportunity to amend his petition - -

THE DEFENDANT: Right.

MS. ROGALA: - - after you admonished him pursuant to the Appellate Court order.

THE COURT: Right.

MS. ROGALA: The Post-Conviction Hearing Act does not provide for counsel at the first stage, only after the petition has been reviewed by the court.

THE COURT: Right, exactly.

MS. ROGALA: And found to contain the gist of the meritorious claim.

THE COURT: Your motion to appoint counsel is denied.

Off call."

The court then confirmed that defendant still had the right to amend his petition and continued the case to August 6, 2010.

¶ 11 The transcript for August 6 reveals that the court acknowledged receipt of defendant's motion for leave to file a successive petition pursuant to the Act and also a supplemental section 2-1401 petition. At the next scheduled proceeding on October 15, 2010, the trial court, without any further input or argument, denied both pleadings. This appeal followed.

¶ 12 On appeal, defendant contends that the trial court again failed to comply with our mandate to admonish defendant pursuant to *Shellstrom* and *Pearson*.

¶ 13 The transcript of March 26, 2010, is the operative proceeding to consider for the purposes of this appeal and the issue of proper admonishments. Therefore, our initial inquiry concerns an apparent misrepresentation of two different transcripts, which both purport to represent to be the transcript for March 26. The parties had filed their briefs before we allowed the State to supplement the record with the accurate transcript for March 26. The record as originally compiled for this appeal, and as relied on by defendant in his briefs, included a transcript purporting to be from March 26, 2010, but which actually was a mistaken duplication of a transcript from August 17, 2007, which necessarily was the subject of the prior appeal (No. 1-07-3402). The mis-filing of the April 17, 2007, transcript as the March 26, 2010, transcript is clear because the inaccurate March 26 transcript (1) is virtually identical to the April 17 transcript, (2) contains an altered date with white correction fluid, and (3) lists the name of the State's Attorney of Cook County as Richard Devine, who held that office in 2007 but left in 2008 and thus did not hold that title in 2010. Accordingly, we will look to the March 26, 2010, transcript filed as a supplement to the original record on appeal to determine whether the trial court complied with our mandate.

¶ 14 Our mandate directed the trial court to admonish defendant pursuant to *Shellstrom* and *Pearson*. However, *Shellstrom* applies to *initial* postconviction petitions while *Pearson* addresses *successive* petitions. In *Shellstrom*, our supreme court held that when a trial court recharacterizes a pleading as a *first* postconviction petition, it must: (1) inform the *pro se* defendant that it intends to recharacterize the pleading; (2) warn the defendant that recharacterizing the pleading means that any subsequent postconviction petitions would be subject to the restrictions on successive postconviction petitions; and (3) give the defendant a chance to withdraw the pleading or to amend the pleading so that the defendant can ensure it contains all the claims appropriate to a postconviction petition that he believes he has. *Shellstrom*, 216 Ill. 2d at 57. *Pearson* applied the rationale in *Shellstrom* to situations where a trial court recharacterizes a pleading as a *successive* postconviction petition. *Pearson*, 216 Ill. 2d at 68.

¶ 15 Here, the *Shellstrom* admonishments apply because defendant had never previously filed a postconviction petition for relief under the Act, only a section 2-1401 petition. Thus, at issue is defendant's section 2-1401 petition filed in 2005 which the trial court recharacterized as an initial postconviction petition.

¶ 16 The March 26 transcript did not clearly identify the pleading at issue. Although the trial court told defendant that it was recharacterizing his section 2-1401 petition as a postconviction petition, the court failed to warn him that any future postconviction petitions would be subject to the restrictions on successive postconviction petitions. The trial court also failed to inform defendant that he could amend the pleading to ensure it contained all the claims appropriate for a postconviction petition, instead telling him he could "put in new information *** for the post-conviction" if he wanted to. Moreover, inferences and stealth admonishments, as suggested by

the State, are not sufficient to comply with *Shellstrom*. Rather, in *Shellstrom*, the supreme court imposed an affirmative duty on the trial court, specifically holding that if a trial court recharacterized a defendant's pleading, "the circuit court must" admonish that defendant. *Shellstrom*, 216 Ill. 2d at 57. Absent a clear showing from the record on appeal that the trial court actually admonished defendant pursuant to *Shellstrom*, we cannot find that the trial court complied with our mandate. Therefore, we must again remand the cause for proper admonishments.

¶ 17 Furthermore, we disagree with the State's suggestion that the court "substantially complied with the requirements of *Shellstrom* and that defendant suffered no prejudice from the admonishments as given." The State fails to cite any legal authority to support its claim that a court need only substantially comply with the *Shellstrom* admonishments, instead citing to authority where substantial compliance was considered sufficient for other types of admonishments. See, e.g., *People v. Fuller*, 205 Ill. 2d 308, 323 (2002) (finding substantial compliance with Supreme Court Rule 402 admonishments to be sufficient). However, even assuming substantial compliance with the *Shellstrom* admonishments would be sufficient, the trial court's "admonishments" in the present case failed to come close to being substantially compliant. The record shows that the trial court completely failed to both warn defendant of the restrictions on any future successive postconviction petitions and tell defendant that he could amend his petition to include all the arguments appropriate for a postconviction petition he believed he had. With such important omissions, the trial court's statements to defendant cannot be considered as substantially complying with the *Shellstrom* admonishments. Moreover, this court has found that, based on the language used in *Shellstrom* that the trial court "must" admonish defendant, the admonishments are mandatory and thus a "harmless error" analysis is inappropriate when considering whether a trial court complied with *Shellstrom*. *People v.*

Escobedo, 377 Ill. App. 3d 82, 88 (2007). Therefore, we decline to consider the State's argument that defendant was not prejudiced by the deficient admonishments.

¶ 18 As a final matter, we note that this is our third remand and defendant now requests a different trial judge. In light of the apparent confusion demonstrated in the record and the parties' briefs, we will not re-assign this case on remand. However, on remand this time we expect that the court will clearly and completely admonish defendant in accordance with *Shellstrom* that (1) the section 2-1401 petition filed by defendant in 2005 will be recharacterized as a petition filed under the Act; (2) this recharacterization means that any later petition filed by defendant will be subject to the restrictions which apply to successive petitions; and (3) defendant has the options of withdrawing his section 2-1401 petition or amending that petition to include every appropriate postconviction claim he believes he has.

¶ 19 For the foregoing reasons, we vacate the judgment of the trial court and remand the cause for compliance with our mandates to admonish defendant properly.

¶ 20 Vacated and remanded.